IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4710 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KANA RUDA BHARWAD

Versus

GUJARAT WATER SUPPLY & SEWERAGE BOARD & ANR.

Appearance:

MR MD RANA for Petitioner

MR DG CHAUHAN for Respondent No. 1

MR HL JANI for Respondent No. 2

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 13/01/97

C.A.V. JUDGEMENT

1. The petitioner is challenging in this petition the order dated 29th May, 1976 made by Dy. Engineer, Public Health Department, Junagadh under which the services of the petitioner were terminated.

2. The facts of this case in brief, are that the the petitioner was appointed as work-charged Chowkidar under

the order of the Executive Engineer, Junagadh Public Health Division in the pay-scale of 90-110 for 29 days only. The appointment order was given effect from 18th April, 1975. The services of the petitioner came to be terminated under the order impugned in this Special Civil Application and the copy of this order has been filed at annexure `B'. The termination of the services has been challenged by the petitioner on the ground that it is illegal, resulting in violation of Article 16 of the Cosntitution and sec.25F of the Industrial Disputes Act, 1947. The ground of challenge is also made that the junior has been retained in the service whereas the service of the senior has been terminated. Reference in this respect has been made to the case of one Dhanjibhai who was appointed as Oil man on 12th May, 1975.

3. The counsel for the respondent Shri D.G. Chauhan, on the other hand, contended that the petitioner's services were terminated with effect from 7-7-1976 and this petition has been filed by the petitioner in the year 1983, and as such, it deserves to be dismissed only on the ground of delay and laches. It has next been contended that the petitioner filed a civil suit challenging thereunder the order of termination of his services and that suit was decreed by the trial court on the ground that the services of the petitioner has been terminated in violation of provisions of sec.25 F of the I.D. Act, 1947, but that decision has been reversed by the appellate court on the ground that in the matter where the workman claims the termination of services to be in violation of provisions of I.D. Act, then proper forum for agitating that claim is Labour court. Instead of approaching to the Labour court thereafter the petitioner filed this petition. It has next been contended that the petitioner is challenging the termination of his services on the ground of violation of provisions of sec.25F of the I.D. Act, and as such, the remedy provided under the said Act could have been only appropriate remedy and not this petition under Article 226 of the Constitution of India. On merits, the counsel for the respondent Shri D.G. Chauhan, contended that the petitioner has not worked for 240 days and as such, the compliance of provisions of sec.25F of the I.D. Act, 1947 need not be made in the present case. Carrying this contention further, Shri Chauhan contended that otherwise also it was a case of fixed term appointment and it has come to an end by efflux of time for which no notice or opportunity of hearing was required to be given. Lastly, the counsel for the respondent contended that it is a case of temporary appointment of the petitioner without any selection, and as such, the respondents have all the

right to terminate the services of the petitioner.

4. The counsel for the petitioner in rejoinder to the submissions made by the counsel for the respondent has placed reliance on the decision of this court in the case of Special Civil Application No.1910/76 on 3-5-1977 and contended that the matter is squarely covered in favour of the petitioner. The petitioners in that case were also the persons who were appointed like the petitioner at different schemes of respondent no.1 and their services were terminated, but this court has held the termination of the services to be arbitrary, violative of Article 14 of the Constitution of India.

5. The petitioner's counsel stated that he filed a C.A. for amendment of the writ petition. That C.A. has not been placed on the board, but I have taken the copy of C.A. from the petitioner and gone through the contents thereof. Through C.A., the petitioner wanted to bring on record further few facts and I permit the petitioner to refer those facts during the course of arguments. By way of amendment, the petitioner firstly wanted to give out the fact regarding filing of the civil suit by him along with other persons. Then the petitioner has tried to give out the fact that the persons who were working on the project of the respondent-State were taken in the service of Sewerage Board.

6. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties. First of all, I consider it appropriate to deal with the preliminary objection regarding delay and laches, raised by the counsel for the respondent Shri D.G. Chauhan. If we go by the dates of termination of services of the petitioner and date of filing of this Special Civil Application then certainly it is a case where there is a gross delay on the part of the petitioner to approach this court, but the petitioner in the present case cannot be blamed for delay and laches. The order of termination of his services has been challenged by the petitioner admittedly, by filing a civil suit and in the civil suit, the civil court (trial court) decided the matter in his favour and the order of termination was held to be invalid and inoperative as being violative of provisions of sec. 25F of the I.D. Act, 1947. The matter was taken up in the appeal by the respondent-State and there the contention appears to have been that the petitioner being a workman and the case has been made out of violation of sec.25 F of the Act, 1947, the proper remedy would have been of raising an industrial dispute and not

the civil suit. That contention found favour with the appellate court and the suit has been dismissed. So taking into consideration these facts, it cannot be said that the petitioner has slept over his right, but he was vigilant and he agitated his right though not before the labour court, but before civil court. In view of this fact, on which there is not dispute, the preliminary objection raised by the learned counsel for the respondent Shri D.G. Chauhan is devoid of any substance.

7. The petitioner has challenged the validity of the order of termination of his services on the ground that it has been made in violation of provisions of sec.25 F of the I.D. Act, 1947. In the statute, Industrial Disputes Act, 1947, a specific remedy has been provided for retrenchment, termination and dismissal of a workman from the services. I find sufficient merits in the contention of the counsel for the respondent, Shri D.G. Chauhan that in case the benefits are being sought under a statute then proper and effective remedy, is which is provided under the statute itself and not the writ petition under Article 226 of Constitution of India. Where a statutory remedy is provided against the termination of services of the petitioner and more so when the challenge has been made on the ground of violation of provisions of the statute itself, the court could have insisted upon the petitioner first to avail of that statutory remedy. The court normally should not encourage the litigants to approach directly to this court under Article 226 of the Constitution in the cases where statutory alternative remedy are being provided. I find great force in the submission of the counsel for the respondent, Shri D.G. Chauhan that the civil court dismissed the suit of the petitioner on the ground that he is a workman and he should approach to the labour court and as such, his approach to this court is not justified. Though this writ petition could have been dismissed on the ground of availability of alternative remedy as well as the conduct of the petitioner that despite of the specific decision of the civil court to approach to the labour court, he has come to this court, but taking into consideration the fact that this writ petition is pending before this court for last 13 years, I do not consider it appropriate to now at this stage relegate the petitioner to the said remedy. Though this preliminary objection has sufficient merits, but as stated earlier, that this matter is pending for last 13 years here, I do not consider it appropriate to dismiss this petition on this ground.

8. Now I may proceed to consider the merits of the

matter. The petitioner though pleaded that he has completed more than 240 days service prior to the date of termination of his services, but the respondent in the reply has denied that fact. In the reply, the respondent has stated that the petitioner has never continuously worked for 240 days. There is no dispute between the parties that the petitioner was initially appointed on 18-4-1975 and his services were brought to an end on 7th July, 1976, but there is also no dispute that the petitioner was given fixed term appointment under the order dated 17th May, 1975 only for 29 days. The petitioner has not produced any record whatsoever on the file of this case regarding extension of his services. It is for the petitioner to establish that he has worked for 240 days in twelve calendar months preceding the date of termination and that burden heavily lies on him which in the present case he utterly failed to discharge.

9. The counsel for the petitioner, Shri M.D. Rana, on the other hand, contended that it is for the respondent to establish that he has not worked for 240 days as they have come up with this case. I do not find any substance in this contention. The respondent has disputed the factum of working of the petitioner for 240 days and where the petitioner pleads it to be a case of violation of provisions of sec.25F of I.D. Act, 1947 then he has to establish as a fact that he has worked for 240 days in twelve calendar months preceding the date of termination. It is true that the petitioner may not have worked continuously for 240 days or there may be break in the services also, but he has to establish as a fact that during twelve calendar months preceding the date of termination he worked in the establishment for 240 days. That is the mandatory requirement and unless it is established as a fact, the termination of the services of the petitioner cannot be held to be in violation of sec. 25F of the I.D. Act, 1947. The petitioner has to stand on his own merits or has to stand on his legs and he cannot shift his burden on the respondent which initially heavily lies upon him. Merely stating that the petitioner has worked for 240 days, it is not sufficient more so when the respondent has come up with a case that the petitioner has not worked for 240 days. It is a disputed question of fact otherwise also, on which this court will not make an inquiry. In the petition under Article 226 of the Constitution if a fact is in dispute, then this court will not make an inquiry and the petition deserves to be dismissed on this ground. As the petitioner has failed to make out any case of his working for 240 days in the twelve calendar months preceding the date of termination of his services, the challenge to the

order of termination on the ground of violation of provisions of sec. 25F of the I.D. Act, 1947 is not sustainable.

10. So far as the challenge to the order of termination on the ground of violation of provisions of sec.25 G of I.D. Act, 1947 is concerned, it is suffice to say that the petitioner has also failed to make out any case in his favour. Shri Dhanjibhai was admitted appointed as a pumpman and the petitioner was appointed as a chowkidar. Chowkidar and pumpman are two posts of different category. It is not the case of the petitioner that the post of pumpman and chowkidar were interchangeable and are the posts of same category. The provisions of sec. 25G of the I.D. Act, 1947 could have been attracted where both the petitioner and the junior person belonged to the same category and not where they belonged to different categories.

11. The respondent has come up with a case that the petitioner was appointed on the project and his services were terminated on the ground of nonavailability of the work. When the services of the petitioner were terminated for nonavailability of work, which fact has not been controverted by the petitioner then this court will not issue a writ of mandamus and cannot compel the respondent to keep him back in the service. The petitioner was merely appointed on temporary basis in a workcharged establishment. It is not the case of the petitioner that his appointment has been made after selection. The petitioner was a temporary Government servant, and as such, he does not acquire any right to continue on the post. It is a settled law that a temporary Government servant does not become permanent unless he acquires that capacity by force of any rule or is declared as a permanent servant. In the case of temporary Government servant while terminating his services no notice or opportunity of hearing is required to be given. Reference in this respect may have to the decision of the Supreme Court in the case of M.P.H.S.V.N. vs. Devendra Kumar reported in JT 1995 (1) SC 198. Reference may have to another decision of the Supreme Court in the case of Secretary, Ministry of Works & Housing, Govt. of India & Ors. vs. Shri Mohinder Singh Jagdev & Ors. reported in JT 1996 (8) SC 46. The employer is entitled to terminated the services of its employees in terms of the order of appointment which confers power to take action in terms thereof. In the present case, the petitioner has been given fixed term appointment for 29 days and the petitioner has not produced the order of extension as it is a case where the

services of the petitioner were continued by giving some break. So there may be possibility of giving appointment all the time for fixed term. So appointment comes to an end by efflux of time. Until the temporary service matures into permanent, the holder thereof has no right to the post. At any time or at any point of time before that right accrues to the employee, it is open to the employer to terminate the services in terms of the order of appointment. It is not the case of the petitioner that the respondents have no power to terminate his services. The petitioner has no right to the post and in case when the work was not available and his services were terminated, it cannot be said to be arbitrary or illegal.

12. So far as the case of Special Civil Application No.1910/76 (supra) is concerned, it is suffice to say that, that was the matter decided on its own facts. There, employees were having more than five to six years services on the day on which their services were terminated. Moreover, in that case, the point regarding the right of temporary Government servant to continue on the post has also not been raised, considered and decided.

13. In view of the decisions of the Supreme Court, reference of which has been made above, otherwise also the petitioner has not right to the post and his claim for reinstatement cannot be accepted, more so when his services were terminated as no work was available for him with the respondent.

14. Taking into consideration the totality of the facts of the case, I do not find any substance in this Special civil Application and the same is dismissed. Rule discharged. Interim relief, if any, granted by this court stands vacated.

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